IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF	)	NO. 37217-7-II
	)	
	)	SECOND
	)	SUPPLEMENTAL
	)	RESPONSE TO
	)	PERSONAL RESTRAINT
FELIX J. D'ALLESANDRO	)	PETITION

Comes now Edward G. Holm, Prosecuting Attorney in and for Thurston County, State of Washington, by and through John C. Skinder, Deputy Prosecuting Attorney, and files its second supplemental response to petitioner's personal restraint petition pursuant to this court's order of July 30, 2010.

I. ISSUES PRESENTED.

This court has asked for supplemental briefing to address Mr. D'Allesandro's right to a public trial, based on *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), in light of the Court's recent decisions in *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (2010), and *State v. Bowen*, __P.3d__, 2010 WL 2817197 (Wash. App. Div. 2). The Court also invited the parties to address the

standard of review for ineffective assistance of counsel in a personal restraint petition recently set forth in *State v. Crace*, __P.3d__, 2010 WL 2935799 (Wash. App. Div. 2).

II. RELEVANT DOCUMENTATION.

Mr. D'Allesandro has filed this personal restraint petition in connection with Thurston County Superior Court Cause # 03-1-1389-1. Attached is a copy of the Juror Questionnaire (redacted to remove the prospective juror's name) as given by the court at the request of Mr. D'Allesandro's trial counsel Mr. Dixon, as Appendix A.

Other documents needed to fully address the court's questions are a copy of two portions of the trial transcript that dealt with the defense motion to the trial court to require the jurors to complete a separate written juror questionnaire and the discussion of the parties regarding the defense proposed written juror questionnaire; specifically, as Appendix B, the state is attaching 3/3/04 Vol. 1, RP 5-6 and 3/4/04 Vol. 2, 208-218.

III. RESPONSE TO ISSUES RAISED

In *State v. Paumier*, 155 Wn.App. 673, the defendant was convicted after a jury trial of residential burglary and theft in the

third degree. The trial court had stated at the outset of voir dire that potential jurors who preferred to answer questions privately to avoid possible embarrassment would be taken into the judge's chambers. *Id.*, at 675-76. Several jurors indicated during the course of voir dire that they preferred to answer certain questions in chambers. *Id.* The trial judge and the parties questioned five jurors in chambers, recording the jurors' responses. *Id.* On appeal, Mr. Paumier argued that his right to a public trial had been violated; the Court agreed and reversed his convictions. *Id.*

The Court based its analysis on the United States Supreme Court decision in *Presley v. Georgia*, __U.S.__, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) .

> Before selecting a jury in Presley's trial, the trial court noticed a lone courtroom observer. The court explained that prospective jurors were about to enter and instructed the man that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely. The court then questioned the man and learned he was Presley's uncle.

The trial judge instructed Mr. Presley's uncle that he could come back after the jury was selected, "but, otherwise, you would have to leave the sixth floor, because jurors will be all out in the

hallway in a few moments". *Id.* Before voir dire commenced, Mr. Presley's trial counsel objected to "the exclusion of the public from the courtroom". *Id.* After the jury selection, the trial commenced, and ultimately, the jury returned a verdict of guilty and Mr. Presley appealed. *Id.*

The U.S. Supreme court stated,

> "The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections on might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. "Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit. That rational suffices to resolve the instant matter. The Supreme Court of Georgia was correct in assuming that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors.
>
> While the accused does have a right to insist that the voir dire of the jurors be public, there are exceptions to this general rule. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest inhibiting disclosure of sensitive information." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). "Such circumstances will be rare, however, and the balance of interests must be struck with special care."

Id., at 4-5.

In the instant case, the petitioner specifically requested a procedure where jurors would be able to request private questioning in his effort to obtain a fair trial. See Appendix A, question #12. The petitioner also asked the trial court to employ a procedure where any prospective juror who had been exposed to pre-trial publicity be questioned privately. The former request of the petitioner was aimed at the hope that if questioned privately, jurors were more likely to reveal closely-held beliefs or experiences of a sensitive nature that might prevent them from fairly and impartially considering the evidence in this highly emotional trial. The latter reason that the petitioner requested that jurors be questioned privately dealt with avoiding the risk that jurors with information about this case gained from the media accounts of this crime might "taint" the other jurors. The trial judge was clearly concerned with ensuring that the jury selection process be fair and in an effort to ensure a fair trial for the petitioner granted his request for the separate written juror questionnaire and the procedure for private questioning of prospective jurors. The State had no objection to the defense motion except as to the specific language and word choices in certain questions of the

proposed written questionnaire; there was no objection to the form or content of Question #12. See Appendix A and Appendix B.

The facts of the instant case reflect that Mr. D'Allesandro, through his attorney, chose a process that emphasized the belief that private questioning of the jurors was the best way was to elicit the most candid answers to select a fair and impartial jury and to uncover the influence of the media stories about this case in a manner that did not taint the other jurors. The goal of defense counsel was to privately question the jurors in an attempt to uncover any issues that might adversely affect his client's right to a fair trial by a fair and impartial jury. In fact, this procedure was very effective for Mr. D'Allesandro as his counsel uncovered, during the private questioning, a juror whose brother's murder remained unsolved, a juror who had been taken hostage at knifepoint in a likely precursor to a rape, and a juror who had a family incident involving murder and decapitation. 3/8/04 Vol. 1, 34-35, 46, and 132-135. There were also a number of other jurors who expressed that they would have difficulty being impartial based on the facts of this case. The private questioning of the jurors most likely contributed to their open and

candid disclosure.

In *State v. Bowen*, __P.3d__, 2010 WL 2817197 (Wash. App. Div. 2), the defendant was convicted, after a jury trial, of possession of a controlled substance (methamphetamine) and first degree unlawful possession of a firearm. *Id.* The trial court had inquired at the outset of jury selection, "does either party have an objection to allowing jurors to take up sensitive issues, sensitive questions, in chambers if they feel that that would be beneficial to them." *Id.* Both the deputy prosecutor and the defense counsel stated that they did not have any objections. During general questioning to the entire venire, some of the jurors stated that they felt strongly about firearms or guns and these things potentially biased them in Mr. Bowen's case. *Id.* The judge then explained on the record that he would question these jurors in chambers for "a number of reasons," such as avoiding tainting the jury pool with bias. *Id.* In chambers, the judge handled the questioning of the prospective jurors but allowed the parties the opportunity to question further or object. *Id.*

On appeal, the Court of Appeals reversed the conviction specifically stating,

"Here, the trial court, not defense counsel, proposed individual

> in-chambers voir dire of jury pool members. Likewise, defense counsel did not actively participate in the in-chambers voir dire; the trial court judge asked all the questions and only asked the attorneys whether they wanted to inquire further or objected to the excusal of jurors. Furthermore, the record does not indicate circumstances requiring individual questioning of jurors in chambers, as opposed to another public location. Finally, although the record shows that the trial court considered Bowen's right to an impartial jury, it contains no indication that either it or the parties considered his right to a public trial or explained that right to him. *See Momah*, 167 Wn.2d at 152 (defendant's right to impartial jury and right to public trial are distinct from each other). Therefore, we cannot conclude that the trial court adequately safeguarded his public trial right or that he made deliberate, tactical choices precluding him from relief.

In the instant case, Mr. D'Allesandro proposed the private questioning of jurors and designed a written juror questionnaire form that specifically gave prospective jurors the option of requesting private questioning. Defense counsel actively participated in the private questioning that the defense had requested. Mr. D'Allesandro benefited from the information gleaned from the private questioning of the jurors.

Two facts facts unique to the instant case regarding the issue of closing the courtroom during portions of voir dire are (1) that the defense proposed the private questioning and proposed a written

juror questionnaire which gave the jurors the option of requesting private questioning during voir dire and (2) that the instant case involves a personal restraint petition.

Relief through a personal restraint petition is available to petitioners where they are under a "restraint" that is "unlawful." RAP 16.4(a)-(c). Collateral relief through a personal restraint petition is limited "because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004)(quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). Thus, challenges based on constitutional error require the petitioner to demonstrate that he "was actually and substantially prejudiced by the error." *State v. Crace,* __P.3d__, 2010 WL 2935799 (Wash. App. Div. 2); *Davis*, 152 Wn.2d at 671-72. Nonconstitutional challenges require that the petitioner show that "the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Crace* at 8, *Davis*, 152 Wn.2d at 672 (quoting *State v. Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)).

In *Crace,* the Court of Appeals set forth the standard of review for ineffective assistance of counsel in a personal restraint petition:

> "For a defendant to prevail on a claim of ineffective assistance of counsel, he must show (1) that counsel's representation was deficient and (2) that the deficient representation prejudiced him. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To meet the first part of the test, the representation must have fallen "below an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). This part is "highly deferential and courts will indulge in a strong presumption of reasonableness." *Thomas*, 109 Wn.2d at 226. For the second part, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," but the appellant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In a PRP, the petitioner usually must show by a preponderance of the evidence that the effectiveness claim is supported by a constitutional error that worked to his actual and substantial prejudice or a nonconstitutional error that results in a complete miscarriage of justice. *Davis*, 152 Wn.2d at 672; *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 874, 883, 16 P.3d 601 (2001); *see In re Pers. Restraint of Benn*, 134 Wn.2d 868, 940-41, 952 P.2d 116 (1998); *In re Pers. Restraint of Frampton*, 45 Wn. App. 554, 562 n.8, 726P.2d 486 (1986); *see, e.g., In re Pers. Restraint of Merritt*, 69 Wn. App. 419, 425, 848 P.2d 1332 (1993); *see also Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 305 (1986).

In the instant case, the trial counsel of Mr. D'Allesandro was not deficient when he chose a generally accepted trial strategy of private questioning of jurors in an attempt to get the most candid

answers to sensitive questions from the prospective jurors and to ferret out any impact the media attention of this case created in the minds of the prospective jurors. Mr. D'Allesandro personally never objected to this procedure.

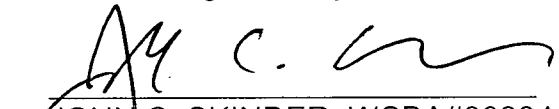
Even if the court finds that trial counsel was deficient, Mr. D'Allesandro's claim must fail unless he shows "actual and substantial prejudice"; clearly, in the instant case, Mr. D'Allesandro cannot demonstrate any prejudice as the jury selected in his trial was done in the manner that he and his counsel chose and was effective in selecting a fair and impartial jury based on the record. Mr. D'Allesandro also cannot demonstrate that there is a reasonable probability that the outcome of his trial would have changed if his attorney had not requested private questioning of jurors.

IV. CONCLUSION.

The State respectfully asks this court to deny Mr. D'Allesandro's personal restraint petition.

RESPECTFULLY SUBMITTED this 10th of AUGUST, 2010.

EDWARD G. HOLM
Prosecuting Attorney



JOHN C. SKINDER, WSBA#26224
Deputy Prosecuting Attorney

APPENDIX "A"

JUROR QUESTIONAIRE

1. Full Name: [redacted]
   Age: 54

2. Are you: (X) Employed ( ) Unemployed ( ) Student
   ( ) Retired ( ) Homemaker

IF YOU ARE CURRENTLY EMPLOYED, PLEASE ANSWER THE FOLLOWING QUESTIONS AS TO YOUR CURRENT JOB. IF YOU ARE UNEMPLOYED, RETIRED, A HOMEMAKER, OR A STUDENT, PLEASE ANSWER AS TO YOUR LAST EMPLOYMENT OUTSIDE THE HOME.

3. a. Where do you work? Educational Service Dist. 113, Olympia
   b. How long have you worked there? 18 mos.
   c. What is your current job title? Substitute Teacher
   d. Do you have hiring, firing or supervisory authority? no
   e. Please describe your job responsibilities. manage elementary school classrooms and libraries in absense of regular teacher/librarian

4. Your marital status: ( ) Single (✓) Married 14 years
   ( ) Separated ( ) Divorced ( ) Divorced and remarried
   ( ) Widowed ( ) Living with someone _____ years

5. What is your highest level of education? Masters Library Science

6. Have you ever served on a jury before? ( ) Yes (X) No
   If yes, what type of case? ( ) Criminal ( ) Civil

7. Have YOU, any member of your FAMILY, or close FRIENDS ever been:

   a. The **victim** of a crime? (X) Yes ( ) No
   b. **Accused** of a crime? (X) Yes ( ) No
   c. **Charged** with a crime? (X) Yes ( ) No
   d. **Convicted** of a crime? (X) Yes ( ) No

If you answered yes to any of the above, please explain the circumstances: Teenage stepson (16) repeatedly stole family car. I was mildly assaulted by him to obtain car keys.

8. The defendants in this case are **Felix J. D'Allesandro** and **Mert C. Celebisoy**. Are you acquainted with either of the defendants? If so, please explain: no - did read synopsis in paper

9. The Judge presiding over this case is the Honorable Richard D. Hicks. The State is represented by David Bruneau and David Soukup. Felix Joseph D'Allesandro is represented by James J. Dixon. Mert C. Celebisoy is represented by Ann Stenberg.. The Defendants are charged with the crime of Murder in the First Degree.

The parties anticipate that the following witnesses may testify at trial: Gordon Phillips, Rod Gray, Lt. Brad Watkins, Det. Dave Haller, and Det. Sue Bergt, all of the Thurston County Sheriff's Office; Detective Jeremy Knight, Lacey Police Department; Dr. Emmanuel Lacsina; Terrence McAdam , Jane Boysen, Matt Knodell and Chris Hamburg, all of the Washington State Patrol Crime Lab, Tacoma; Kathy Taylor, King County Medical Examiner's Office; George Millar and Robert Johnson, WSP Crime Lab; Jay Barrett; Charles Cortelyou; Jessica Hunting; Deshsa Davis; Gidget King; Meghan Graham; Mary Nightengale; Stephen Robinson; Robert Wadsworth; Keith Baker; Joshua Gertsner; Shawna Miller; Daniella Kehoe; Julie Allen; Melinda Schori; Peter Wing; Keiko Munchechia; John Celebisoy; Claudia George; Robert Ward; Linda Ward; Amy Calahan, Thurston County Geodata; Dan Deboer, Roads & Transportation Services; Dr. Brett Trowbridge; and Dr. Daniel Sealove.

Are you acquainted with any of the attorneys, any of the witness, or the judge? If so, please describe such acquaintance. For several years I was a neighbor of Judge Hicks. My daughters and his were friends.

10. In general terms, this case involves the allegations that Mr. Celebisoy and/or Mr. D'Allesandro committed the crime of murder in the first degree between June 15, 2003 and July 1, 2003, in Thurston County, Washington. The victim of the alleged murder is David George. Further, it is alleged that one or both of the co-defendants dismembered the deceased and disposed of body parts in a rural area of Thurston County.

Have you heard or read about this case in the media or through other sources? (X) Yes ( ) No

a. If yes, please describe briefly what you know about this case.
nothing more than outlined above.

b. Would what you have heard or read about this case affect your ability to be a fair and impartial juror on this case? ( ) Yes (X) No

11. a. Has any member of your family, any relative or anyone you know been a victim of a homicide? (X) Yes ( ) No
If yes, please describe briefly: The daughter of my husband's relatives was murdered in her front yard in front of her parents by teen agers she was befriending in a community service program.

b. Have you, any member of your family, any relative or anyone you know been accused of committing an act of homicide? ( ) Yes (X) No
If yes, please describe briefly: _____

12. Do you wish to be interviewed privately about any of the questions listed above? Please list the numbers of any such questions.
( ) Yes as to questions _____
(X) No

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

[redacted]
Signature

APPENDIX "B"

dicker with that offer of proof and we may not have to have further argument. I don't know. So I don't believe that will take too much time.

Finally, your Honor, we have the motion to sever that I received -- excuse me, that we received last night shortly before five p.m. from Ms. Stenberg regarding the motion to sever, and we will be prepared to address that later on this morning or early this afternoon. Mr. Soukup is going to be working on that while we're engaged in taking testimony. So I think, your Honor, that we might be completed with everything by noon.

THE COURT: All right. And looking ahead to Monday my guess is we'll call in a venire, the pool of jurors, that would be too large to fit in this courtroom so we'll probably do the first day of voir dire in the large courtroom downstairs, and then once the group gets down to about 50 we'll come back here and the trial will be in this courtroom and even any second half of voir dire if necessary once the prospective jurors are down to about 50.

But do you plan to have any type of juror questionnaire?

MR. BRUNEAU: We did not, your Honor. I just received one from Mr. Dixon this morning, and I

haven't had a chance to look at it, and again, that's something I think we can work out with counsel.

THE COURT: All right then. I'll turn to defense attorneys. Mr. Dixon.

MR. DIXON: Good morning, your Honor. May I approach the bench?

THE COURT: Yes.

MR. DIXON: I want to hand to the Court a bench copy of my client's proposed questionnaire.

THE COURT: All right.

MR. DIXON: Other than that, surprisingly I guess I concur with Mr. Bruneau's statements this morning. I think we can do this relatively quickly hopefully. I was telling Mr. Bruneau this morning that I always have difficulty wrapping my pea brain around what's commonly referred to as the *Bruton* issue. I've studied it again at some length over the last couple of days, and my inclination is to accept the state's offer of proof. I think we've done a pretty good job of cleaning up all of the potentially objectionable issues, at least as it relates to my client, Mr. D'Allesandro.

THE COURT: All right. We still have the 3.5 issue regarding the statements that were made at

car to a friend, but few people would loan a car in a non-emergent situation to an unknown person or a stranger, or "someone."

So although I'll initially find the offer of proof made by the state is sufficient here, if counsel want to re-visit this again, because I know Ms. Stenberg was looking for another instance and in the press of the moment here was unable to put her finger on it, you could bring it to my attention first thing Monday morning so that I would have some time to look at it.

MS. STENBERG: Thank you, your Honor.

THE COURT: But on the surface this appears to be all right.

MS. STENBERG: Thank you.

THE COURT: There's also the issue regarding this questionnaire, and I'd like each of the attorneys to address this, and we also have some other motions in limine I guess from Ms. Stenberg. The only problem I noticed, and I don't really think it's vanity, and that is my name is wrong.

MR. DIXON: Pardon me for laughing, Judge.

THE COURT: And I'd ask that you change the middle initial to D instead of G.

MR. DIXON: No objection.

THE COURT: Thank you.

Mr. Bruneau.

MR. BRUNEAU: Well, I suppose taking off on your Honor's comment about vanity, I've had informal discussions with Mr. Dixon about his proposal, and I don't have any substantive difficulties with it, but I believe on page 2 of his proposed questionnaire he talks about the parties in the case, and normally the plaintiff -- that is the attorneys for the plaintiff, the State of Washington, are listed first, and given the order of proof and the way that tradition has always dictated the manner of the order of introducing the parties, I would prefer to see the state and the attorneys for the state listed first.

The only other -- Mr. Dixon has referred to homicide. I believe it would be more appropriate to refer to this case for what it is, the defendants are charged with murder, and I would -- so I would ask that the references to homicide be changed to murder.

And also I have provided Mr. Dixon -- I've deleted some of the witnesses that are not going to be called, and I believe I gave him a copy of that. Those are the only objections I have. But like I

say, they're not substantive. In fact I've given Mr. Dixon a copy of all of my suggestions.

THE COURT: All right. I hadn't heard about the order of the names since mine is last. But I do think it would be appropriate to put the court -- the identification of the court first, the plaintiff second and the defendants third. That's the custom we follow.

But in this same regard, let me say at this very early stage that on the proposed jury instructions I'd like the plaintiff, when they propose their jury instructions, to follow the WPIC form, which has the words "not guilty" first and word "guilty" second. And somehow your office, way before you rejoined, got those turned around, and so then my assistant has to turn them around.

MR. DIXON: Can I be heard on that issue?

THE COURT: Yes, of course.

MR. DIXON: I'm glad you mentioned that, your Honor, because I raise that issue virtually every trial, and it's my experience that every other judge disagrees, does not take exception to the state's pattern instructions regarding the word "guilty" preceding "not guilty" because it is as the Court mentioned the other way around in the pattern

instructions.

But in addition, if the Court looks carefully at -- any court or anybody for that matter looks carefully at the pattern instructions, the pattern instructions do not capitalize the charged offenses. And so the instructions that I'll be proposing will include the charged offense and perhaps any lesser included offenses in lower case letters. I just want to bring that to the Court's attention. I think that's consistent with the pattern instructions as well.

THE COURT: I would tend to follow the pattern that has been approved and comes as a result of the study of defense lawyers, prosecutors, judges, is a pattern form committee under the direction of the Supreme Court, and although no trial judge is bound to that pattern, every judge has their own responsibility if they want to vary it. I'd like to start with the pattern. There was a time period when I didn't agree with the reasonable doubt instruction and so I wrote my own for instance, but I like to start with the pattern and then listen to reasons why we might move away from it, but kind of getting on to a collateral issue. Do you have objection to any of Mr.

Bruneau's other comments?

MR. DIXON: I do. I advised Mr. Bruneau earlier that I think he was right quite frankly. I think the state's -- the identification of the players for the state should precede the identities of the defense attorneys, and I will follow the Court's suggestion that the Court be named first followed by the plaintiff, attorneys for plaintiff, and then lastly Ms. Stenberg and myself.

I do, however, suggest that the -- my questionnaire include the term "homicide" as opposed to murder. Homicide is a more, for lack of a better term, generic description of what this case is all about. True, both defendants have been charged with a murder, but the case is a homicide, and in the event this Court offers -- or offers lesser included instructions other than murder, I think homicide is a more facially neutral word to use, especially when it's used in the form of a jury questionnaire.

The jury will be advised from the outset that both defendants are being charged with a murder. The allegations are of a murder, but I think it is at the stage where the questionnaire is provided to prospective jurors that they simply be advised that this is a case involving a homicide. So I think for

that reason my proposal makes more sense and I'd ask the Court to follow that recommendation. Thank you.

THE COURT: Let me hear from Ms. Stenberg first, and then Mr. Bruneau, you can reply to each.

MS. STENBERG: Your Honor, I would just join Mr. Dixon in his concern that the jury questionnaire not be some sort of cue to the jury by naming the case as a murder case, but instead replacing "murder" with "homicide," or leaving it the way it is I guess is better said. Other than that, I have no objection to this questionnaire.

THE COURT: Well, all right. I'll listen to Mr. Bruneau. I'll point out sometimes we lawyers lose the forest while we argue about the trees. In paragraph 9 as presented by the defendants here it says, "defendants are charged with crime of murder in the first degree." And other places it does talk about homicide. I could see where it -- first I thought, well, maybe we should have consistent references, all be murder or all be homicide, but then it occurred to me that it's quite right to inform them as to the particular charge, murder in the first degree, but when inquiring about whether or not they or their family members or friends have any association with other instances of this type,

it might be better to use the word "homicide," which could include manslaughter and murder in the second degree and justifiable homicide and so on, which I'm sure all of the attorneys would be interested in.

Mr. Bruneau.

MR. BRUNEAU: Well, your Honor, you know, I don't particularly care for lawyers that parse at words, and I don't think we are parsing at words. The problem I have is that homicide is not a crime. Homicide is a manner of death, and it may be murder, manslaughter, vehicular homicide, excusable or justifiable. It is simply that which separates a manner of death from suicide. Now, the defendants are charged with murder. I think the jury ought to be told that.

With regard to victim of a crime, one is a victim of either murder or manslaughter or vehicular homicide. I would propose that proposal for that portion of the questionnaire, but to call what the defendants are accused with anything less than a crime I think is being disingenuous to the jury.

THE COURT: So let me see where it is we're talking about. In paragraph 9 Mr. Dixon has, "The defendants are charged with the crime of murder in the first degree." He's submitted that and that's

in accord with your own understanding. So I guess it's in paragraph 10 where the word "homicide" appears. And if you read paragraph 10 in its entirety, which has a reference to dismembering the deceased and disposing of body parts, I wouldn't see any prejudice to changing the word "homicide" to "murder" in the same paragraph and immediately preceding sentence.

Where else would this appear?

MR. DIXON: Paragraph 11, your Honor.

THE COURT: Paragraph 11.

MR. DIXON: Both A and B.

THE COURT: It might be better there to use homicide.

Mr. Bruneau, you want to address paragraph 11? I'm going to go with you on paragraph 10, but what about paragraph 11 here? Maybe -- I mean homicide as you aptly point out opens up a much broader door than if you say has anyone been a victim -- has any member of your family or relative been a victim of murder in the first degree.

MR. BRUNEAU: Well, your Honor, in that paragraph I would propose has anyone been a victim of murder, manslaughter or vehicular homicide. I mean those are the only crime categories we have for

the manner of death which is homicide.

THE COURT: Mr. Dixon.

MR. DIXON: If all the potential jurors are lawyers, I wouldn't have any objection to that, but I think it's a hard argument to make that potential jurors are going to understand the differences between those three if that's -- if the questionnaire includes the term "homicide," I think that covers all of the bases. And that's after all what the purpose of the questionnaire is designed to -- what the questionnaire is designed to accomplish.

THE COURT: I guess the way I'll resolve this is I'll leave it the way it is in 9, murder in the first degree. I'll change it in 10 from homicide to murder in the first degree. I'll leave 11 as homicide because I think it opens up a broader range of possible answers from jurors, which after all is what we want, just to get them to speak and not be in the situation of, well, that isn't exactly what they asked so I didn't respond.

MR. DIXON: I also -- I think it would be -- all parties would be best served, your Honor, if somewhere in this questionnaire I include the identity of Mr. George, and I'm open for suggestions in that regard. Perhaps --

THE COURT: I would ordinarily ask any potential juror if they were acquainted with the deceased so that would not be improper to put in this questionnaire. The only thing I noticed about this questionnaire is it speaks to most of the questions that the court would ask at the beginning, but I don't have any objection to having this put before me as a questionnaire instead of me verbally asking them.

I don't mean to leave Ms. Stenberg out here yet, but Mr. Bruneau, you agree there should be some question regarding whether any juror has any acquaintance with David George?

MR. BRUNEAU: That would be fine, your Honor.

THE COURT: So let's add that as a question.

MR. DIXON: Where?

THE COURT: Well, I didn't make this.

MR. DIXON: I guess what I'll do, your Honor, is just in the interest of time, speak with Mr. Soukup and Mr. Bruneau at the conclusion of today's hearing. I'm sure we can agree to proper language, proper format. If we can't, we'll come back before the Court.

THE COURT: I think you folks can work it

out, but probably come in around 9 somewhere where the other witnesses are identified.

MR. DIXON: Okay.

THE COURT: Not necessarily listed among those, but around that point in the questionnaire.

Ms. Stenberg, you have any different position on that?

MS. STENBERG: No, your Honor.

THE COURT: Anything else about the questionnaire?

Okay. If you'll give me one that all parties agree with, after the modifications have been made to the court staff sometime tomorrow they'll have time to Xerox a hundred or so copies so that the prospective jurors can begin answering this when they first arrive in the morning on Monday.

Now, what does that bring us up to? These motions in limine?

MS. STENBERG: That's correct, your Honor.

THE COURT: All right.

MR. SOUKUP: Your Honor, I can probably save a little bit of time in this regard because I think there's some of these things the state would agree to.

THE COURT: All right.

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Second Supplemental Response to Personal Restraint Petition, on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid

☐ ABC/Legal Messenger

☐ Hand delivered by

TO: David C. Ponzoha, Clerk
Courts of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

--AND ***(attorneys for Felix D'Allensandro)***--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of August, 2010, at Olympia, Washington.

Chong McAfee